Balázs Tőkey*

Questions on the Cultural Cohesion (Embeddedness) of Succession Law – the Hungarian Example**

According to the traditional theory, succession law is strongly influenced by cultural factors. However, this widely held view is challenged today. Our aim is to give an explanation of how culture and political factors influence succession law with the help of experience from the recodification of succession law in Hungary. We think that lawyers overvalue the role of culture (traditions) in succession law; however, the political views of the governments can influence the regulation of succession what can make a future harmonization of succession law in the European Union less likely.

I Introduction

It is a popular view that succession traditions and succession law are strongly influenced by cultural circumstances.[1] According to this aspect, succession law is similar to family law and this fact explains 'why most publications on the law of succession aimed at an international audience are only meant to give information on one or more particular systems of succession law, without offering a comparative legal analysis. A comparison of succession laws is quite often seen as not fruitful in the light of the differing underlying social, cultural, economic and religious aspects; it is considered to be a senseless exercise.'[2] These circumstances are seen to

* Balázs Tőkey is senior lecturer at Eötvös Loránd University (ELTE), Budapest, Faculty of Law, Department of Private Law (e-mail: tokeybalazs@gmail.com).

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1 E.g. Tünde Mikes and Tomas de Montagut, 'Family Succession Wars: Succession Norms and Practices in Medieval and Modern Catalonia' in Maria Gigliola di Renzo Villata (ed): *Succession Law, Practice and Society in Europe across the Centuries* (Springer 2018, Cham, Switzerland) 21.

2 Sjef van Erp, 'New Developments in Succession Law' (2007) 11 (December) Electronic Journal of Comparative Law <http://www.ejcl.org/113/article113-5.pdf> accessed 10 December 2019, 1–2.

be why 'succession law does not develop by rapid and radical changes, as for example, does contract law'.[3]

These articles do not explain what they mean under the terms culture and traditions. Of course, we do not try to give clear definitions for these expressions because it is impossible in the frame of a short paper. However, we guess that we should understand under these expressions in connection with succession and succession law that people have a common knowledge of succession rules in different societies and they accept these rules; they think these rules are correct – and they do not want these rules to be changed.[4]

However, this widely-held view is challenged today – especially by Reinhard Zimmermann, who expresses his doubts about the idea that the differences in the succession rules of some legal systems are based on cultural diversity.[5] Our aim is to give another explanation of how culture and political factors influence succession law with help of the experience of the recodification of succession law in Hungary. The importance of this question is clear: if there are significant culture-based differences between the succession rules of the member states of the European Union then the success of a future harmonisation of succession law is rather doubtful. However, if these cultural differences are not real, a future harmonisation is possible.

II The Most Important Difficulty in the Evaluation of Cultural Factors on Succession Law

Before the detailed presentation of the above-mentioned main theories on the connection between culture and succession law, we would like to draw attention to one important deficiency which hinders us from finding the correct answer in this debate, namely that it is unknown why succession traditions are different in some legal systems. The best example is, on the one hand, the prevalence of intestacy and, on the other hand, the testation rate.

The prevalence of intestacy is quite varied around the world. For example, in France 'fewer than 10 per cent of estates are transferred by will and, according to an opinion poll, only 3 per cent of French adults have ever envisaged disinheriting a member of their family'.[6] In Italy, scholars 'have been speaking of a 'crisis of the will' since the 1970s. […] This trend is confirmed by more recent figures, which reveal that in 2009 only about 16 per cent of all declared estates were distributed on the basis of a will.'[7]

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3 Urve Liin, 'Laws of Succession in Europe and Estonia: How We Got to Where We Are and Where We Should Be Heading' (2001) 6 Juridica International <https://www.juridicainternational.eu/public/pdf/ji_2001_1_114.pdf> accessed 8 November 2019, 114.

4 This interpretation – that people are fond of the habitual rules in the field of succession law – is popular in Hungary as well. See Weiss Emilia, A *túlélő házastárs öröklési jogi jogállása történeti kialakulásában és fejlődési tendenciáiban* (Akadémiai Kiadó 1984, Budapest) 33.

5 Reinhard Zimmermann, 'Kulturelle Prägung des Erbrechts?' (2016) 71 (7, April) JuristenZeitung (JZ) 331.

6 Cécile Péres, 'Intestate Succession in France' in Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann, *Intestate Succession – Comparative Succession Law,* Volume II (Oxford University Press 2015, Oxford) 34.

7 Alexandra Braun, 'Intestate Succession in Italy' in Reid, de Waal, Zimmermann (n 6) 68.

In other countries, testate succession is somewhat more popular (e.g. 'between 25 and 35 per cent of the German population die testate'[8] or Hungary where 'around 30 per cent of probates involve testamentary dispositions').[9] Moreover, testate succession is as common as intestate succession or even more popular in some legal systems. For example, according to a study from 2013, around half of the 19,103 Dutch respondents were found to have made wills.[10] Similarly, 'although conclusive data are lacking, studies suggest that fewer than half of all successions in Spain are intestate',[11] and 'contrary to what seems generally to be assumed, the vast majority of those who, in England and Wales, die leaving property of any significant value choose to make wills. Intestacy, for those who have property of value, is very unusual.'[12]

We can find this mixed picture of the prevalence of intestacy not just in Europe, but all around the world.[13] For example, on the one hand, 'testacy rates are quite low in Latin America', however Cuba is a notable exception;[14] on the other hand, in Australia and New Zealand, 'most recent studies suggest a [testation] rate of 54 to 55 per cent for adults over the age of 18. This may be increasing.'[15]

Despite all the data mentioned above, it is not known why the prevalence of testate succession differs around the world.[16] It is not known either why people write or do not write a testament examining just one country. Ronald J. Scalise Jr. writes the following about this question regarding the law of the United States where the rate of intestate succession is around 60 per cent:

> The exact reason for the prevalence of intestacy is uncertain. Some may feel they have too few assets to need the services of an estate planner. Others may believe the laws of intestate succession appropriately distribute their estate. Still others, no doubt, are hesitant to draft wills out of a reluctance to contemplate their own mortality. Whatever the reason, the prevalence of intestacy is clear, and only a detailed examination of the application and history of the rules of intestate succession can shed light over the wisdom of its broadly applicable principles.[17]

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[8] Reinhard Zimmermann, 'Intestate Succession in Germany' in Reid, de Waal, Zimmermann (n 6) 182.

[9] Lajos Vékás, 'Intestate Succession in Hungary' in Reid, de Waal, Zimmermann (n 6) 275. We have to mention that according to surveys made at the beginning of the twentieth century because of the preparation of a civil code the testation rate was about 10 percent in Hungary. See Tárkány Szűcs Ernő, *Magyar jogi népszokások* (Gondolat 1981, Budapest) 728–729.

[10] Wilbert D. Kolkman, 'Intestate Succession in the Netherlands' in Reid, de Waal, Zimmermann (n 6) 225.

[11] Sergio Cámara Lapuente, 'Intestate Succession in Spain' in Reid, de Waal, Zimmermann (n 6) 97.

[12] Roger Kerridge, 'Intestate Succession in England and Wales' in Reid, de Waal, Zimmermann (n 6) 97.

[13] Kenneth G. C. Reid, Marius J. de Waal and Reinhard Zimmermann, 'Intestate Succession in Historical and Comparative Perspective' in Reid, de Waal, Zimmermann (n 6) 444.

[14] Jan Peter Schmidt, 'Intestate Succession in Latin America' in Reid, de Waal, Zimmermann (n 6) 122.

[15] Nicola Peart and Prue Vines, 'Intestate Succession in Australia and New Zealand' in Reid, de Waal, Zimmermann (n 6) 349.

[16] Reid, de Waal, Zimmermann (n 13) 445.

[17] Ronald J Scalise Jr, 'Intestate Succession in the United States of America' in Reid, de Waal, Zimmermann (n 6) 403.

Of course, Ronald J. Scalise Jr. writes just about the law of the United States, but his thoughts could be true for many other countries.[18]

We think that without answering this fundamental question we cannot close the debate on the connection between culture and succession law. We thus hope that several legal and sociological studies will soon deal with this problem, which could help us to answer the question whether and why people write or do not write a will.

III Theories of the Cultural Influence in Succession Law

As we mentioned above, according to the traditional theory, succession law is strongly influenced by cultural factors. The main argument that supports this concept is the tight connection between family and succession, as well as between family law and succession law.[19] This theory is usually, accepted as an axiom, which does not need any explanation: succession law is based on family relationships regulated by family law and the concept of family and family law is influenced by cultural factors, and so succession law must be influenced by them, too.

However, Reinhard Zimmermann calls this theory, that cultural impacts would be that important around succession law and these factors would be a real impediment in front of the sense of comparative succession law and the harmonisation of succession law in the European Union, into question. He collects several arguments in favour of his concept. We will summarise the most important ones in the following paragraphs.

First, he shows that there are important differences between the succession regulations of similar legal systems – legal systems from the same legal culture – and there are important similarities between the succession regulations of different legal systems – legal systems from distinct legal cultures. However, if we accepted the theory of the important role of cultural factors in succession law, it would mean that legal systems that are part of the same legal culture should have similar succession regulations and legal systems that are part of distinct legal cultures should have different succession regulation into question. Zimmermann gives examples of the handwritten or holographic will: the legal systems of Latin America belong to the same legal culture – these are part of the civil law systems with similar legal traditions – but, on the one hand, the handwritten or holographic will is an orderly form of the testaments in Paraguay, Panama and Peru; on the other hand, handwritten or holographic wills are not acknowledged by the Uruguayan, Columbian and Bolivian law.[20] It is also interesting to notice the differences and similarities between the structure of intestate succession in some legal systems. There are three different models: the 'French' system (e.g. France and Italy), the 'three-line system' (e.g. Spain and Latin America) and the parentelic

[18] Reid, de Waal, Zimmermann (n 13) 445.
[19] E.g. van Erp (n 2) 1, and Liin (n 3) 117.
[20] Zimmermann (n 5) 323–324.

system (e.g. Germany and Switzerland). On the one hand, it is true that legal systems with a similar legal culture often follows the same intestate succession model (e.g. Spain and Latin American countries belong to the three-line system); on the other hand, it is also common that legal systems with different legal cultures follows the same intestate succession model (e.g. Germany as a civil law country follows the parentelic system, which is accepted by several common law legal systems, see England and several states in the United States of America).[21] Moreover, it has also happened in the recent history that a legal system changed the intestate succession model as a result of the recodification of succession law. This happened in the Netherlands in 2003: the Dutch Civil Code of 1838 followed the French Civil Code and its intestate succession norms were close to the French model. However, the new Dutch Civil Code of 2003 contains an almost pure parentelic model.[22] Seeing these examples, we can easily notice that fundamental succession norms could be different in similar legal systems and could be similar in different legal systems.

As a second argument Zimmermann refers to the historical examples of (re)codifications. For example, there was intense debate during the drawing up of the succession law norms in the German Civil Code *(Bürgerliches Gesetzbuch, BGB)* at the end of the 19th century over whether the model of handwritten or holographic will should be acknowledged, because this testament form derived from French law and it was only known in that part of Germany that was influenced by French law. It is not a surprise that lawyers argued against the handwritten or holographic will by referring to cultural values. At last the concept of handwritten or holographic will was incorporated by the legislator and, despite the heated historical debate, this testament form is totally accepted in Germany and practically no-one knows that handwritten or holographic wills have been imported from France.[23]

Finally, we emphasise that modern trends in the development of succession law in Europe and in other parts or the world are quite similar as well. We should first mention that we notice the liberalisation of the formal rules of testaments. Second, the circle of relatives who are potential heirs is narrowing. The third trend is the elimination of the discriminative rules against extra-marital and adopted children. Last but not least, we shall mention the strengthening of the position of the surviving spouse.[24] Seeing these trends, we shall ask: why would comparative succession law and the harmonisation of succession law in the European Union be pointless?

If we consider all of these arguments, we have to admit that the role of cultural factors in succession law is not evident. This conclusion seems to be weak but, as we mentioned before, without the examination of some fundamental questions on the differences of succession traditions between different societies, we cannot evaluate the importance of cultural factors to succession law. It means that we shall not automatically accept these statements, that culture and traditions have a significant influence on succession law, and we need to perform wide quantitative research in this field before trying to answer this question.

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[21] Reid, de Waal, Zimmermann (n 13) 458–461.
[22] Kolkman (n 10) 228–229, and Reid, de Waal, Zimmermann (n 13) 459.
[23] Zimmermann (n 5) 324.
[24] Zimmermann (n 5) 326–327.

IV The Hungarian Example

As we presented above, the popular view that there is a tight connection between culture and succession law is strongly questioned, especially by Reinhard Zimmermann. Reading his convincing arguments, we could think that there are no serious impediments in the way of a future harmonisation of succession law in the European Union. However, we must not forget that there could be other factors than culture that could negatively influence legal harmonization. The experience of the recodification of succession law in Hungary gives us good examples for these possible impediments.

The Hungarian civil law was recodified at the beginning of the 21st century. The new Hungarian Civil Code of 2013 (NHCC) entered into force on 15 March 2014. The Codification Committee of the NHCC followed the principle of 'minimalist' recodification: only those norms that had been questioned before, especially by the jurisprudence, were suggested as those to be changed.

First we would like to show that the importance of cultural factors in succession law was clearly accepted by the Hungarian legislators. For example, this was the main reason for the preservation of 'lineal inheritance or succession' 'which, substantively, means that certain properties are returned to the deceased's family if the deceased leaves no children or descendants, instead of going to the spouse'.[25] As Lajos Vékás, the chairman of the Codification Committee of the NHCC explains, the 'reason for its retention was that the evidence from both notarial and judicial practice indicated that this corresponded with the wishes of the general population'.[26] However, the need for this institution significantly decreased in the NHCC, which identifies the parents and the surviving spouse as the intestate heirs in the absence of descendants – the former Hungarian Civil Code of 1959 (FHCC) identified just the surviving spouse as the only intestate heir in this situation. According to the new rules, in the absence of descendants, the parents inherit together with the surviving spouse as intestate heirs and 'lineal inheritance' only complete the rights of the parents. In contrast, 'lineal inheritance' was the only way for the parents to inherit after the deceased in the absence of descendants in the frame of the FHCC. It means that, because of the belief in the rule of culture in succession law, such a legal institution, which was not really needed after the amendment of other succession rules, was preserved.

We can see the same belief regarding compulsory share: the Codification Committee of the NHCC did not want to change its main rules. It 'has become an integral part of the Hungarian private law culture; this cultural tradition practically survived the modifications of the Civil Code [FHCC]'.[27] However, the extent of the compulsory share – from half to one third of the share the persons entitled to a compulsory share would receive as intestate heirs – was

[25] Hella Molnár, 'The Position of the Surviving Spouse in the Hungarian Law of Succession' (2014) (2) ELTE Law Journal 96.
[26] Vékás (n 9) 283.
[27] Molnár (n 25) 102.

modified in the final version of NHCC because of an accepted amending proposal from a member of parliament. Some lawyers protested at this solution – the justification for the amending proposal was unknown – but there was no other reaction; the media did not pay any attention.

We think that these two cases show that, if cultural factors in succession law are overestimated, the belief in these factors is still strong among lawyers. And their beliefs highly influence the legal harmonisation processes in the European Union.

Our second example for the possible impediments are political factors, which are presented by the discussion of the legal position of cohabitants as intestate heirs[28] in Hungary. Cohabitation is increasingly common in Hungary: according to last census (2011), more than 910,000 Hungarians live in cohabitation. This number was about 250,000 in 1990.[29] However, cohabitants were not intestate heirs according to the FHCC and the Codification Committee wanted to amend this rule because of these changes in Hungarian society. According to its proposal, 'a surviving extra-marital partner would have inherited a lifelong right to use the residential apartment and the related personal chattels jointly used with the deceased. The condition was that the partners shall have cohabitated for at least ten years, including the time of the deceased's death. However, this proposal was eventually not incorporated into the CC of 2013 [NHCC].'[30] The explanation is that the original proposal was clearly supported by the former socialist-liberal government – the earlier draft version of the NHCC from 2009, which did not enter into force, finally incorporated this proposal – but after the 2010 elections the new conservative government did not support the addition of cohabitants to the circle of intestate heirs because of their rigid concept of family: it shall be based on the marriage between a woman and a man. We therefore must not forget that not only cultural factors could impede the harmonisation of succession law in European Union; there are other ones as well. in the first place political factors.

Finally, we would like to emphasise another interesting phenomenon in connection with the recodification of succession law in Hungary. The NHCC does not follow some of the international trends mentioned before. On the one hand, the 'NHCC introduces one more Parental with the great-grandparents of the deceased and their descendants'[31] – according to the FHCC, the descendants of the great-grandparents of the deceased could not be intestate heirs. It means that the circle of relatives who are potential heirs has widened. On the other hand, the position of the surviving spouse has weakened. As we mentioned before, she or he is not the only heir in the absence of descendants – as was the case under the FHCC – but must share the estate with the parents of the deceased.

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[28] The development of succession regulation on the acceptance of cohabitants as intestate heirs is rather controversial regarding European countries. See Reid, de Waal, Zimmermann (n 13) 504–508.

[29] See <https://www.demografia.hu/hu/tudastar/fogalomtar/67-elettarsi-kapcsolat> accessed 8 October 2019.

[30] Vékás (n 9) 288–289.

[31] Molnár (n 25) 96.

V Conclusions

First, we shall repeat that we will not understand the role of culture in succession law if we do not know why succession traditions are different in some legal systems and what are the reasons for the customs about succession by examining just one country, for example why people write or do not write a testament. We cannot close the debate on the connection between culture and succession law without legal and sociological studies dealing with this issue.

Second, we shall make a distinction if we speak about culture: we can speak about the culture of the population in a country and we can speak about legal culture or the culture of the lawyers in a country. All the examples mentioned above show that culture in the second meaning has a much more important role in succession law than in the first one. It means that the population of the European Union could accept a new harmonised succession law quite easily but the harmonising process would be very difficult because the lawyers working on it would try to protect the values of their own national succession law as part of their legal culture.

Third, we must not forget that several questions in succession law are not purely professional-legal questions but political-ideological questions as well (e.g. the acceptance of cohabitants or same-sex partners as intestate heirs). It means that the different political values and views of the governments of the day could do more to hinder the harmonisation of succession law in the European Union than the differences of legal cultures between the member states.